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ORIGINAL EXCEPTION

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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

Arizona Corporation Commission

DOCKETED

MAR 26 2004

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IN THE MATTER OF THE QWEST
CORPORATION'S COMPLIANCE WITH
SECTION 252(e) OF THE
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. RT-00000F-02-0271

IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

ARIZONA CORPORATION COMMISSION,

DOCKET NO. T-01051B-02-0871

Complainant,

v.

QWEST CORPORATION,

**QWEST CORPORATION'S
EXCEPTIONS TO AMENDED
RECOMMENDED OPINION AND
ORDER**

Respondent.

Qwest Corporation ("Qwest"), through its undersigned counsel, respectfully submits these exceptions in response to the amended Recommended Opinion and Order filed on March 10, 2004 in the above-referenced dockets ("March 10 Recommended Order").

First, Qwest maintains that the Settlement Agreement originally the subject of these consolidated proceedings fairly resolves these three dockets and benefits the industry as a whole, as well as Arizona ratepayers. Qwest therefore renews its earlier

1 exceptions to the original Recommended Opinion and Order filed on December 1, 2003
2 ("December 1 Recommended Order"), except as specifically modified herein. As
3 amended, the March 10 Recommended Order is still procedurally defective because it
4 purports to resolve two of the three dockets at issue on their merits, rather than returning the
5 parties to their pre-settlement positions as required by the express terms of the Settlement
6 Agreement. Further, as outlined in Qwest's previous exceptions, the March 10
7 Recommended Order still reaches unfounded conclusions concerning Qwest's conduct,
8 orders management initiatives and penalties that are beyond the Commission's authority,
9 and awards credits to CLECs without any showing of eligibility or actual harm. None of
10 these actions are supported by substantial evidence in the record, and all are contrary to law.

11 The Settlement Agreement specifically provides:

12 Each provision of this Agreement is in consideration and
13 support of all other provisions, and expressly conditioned
14 upon acceptance and approval by the Commission without
15 change. Unless the Parties to this Agreement otherwise
16 agree, in the event that the Commission does not accept and
17 approve this Agreement according to its terms, then it shall be
deemed withdrawn by the Parties and the Parties shall be free
to pursue their respective positions in the Litigation without
prejudice.

18 Agreement § 19. Qwest and Staff jointly gave notice of the Settlement Agreement and
19 requested a hearing on the sole issue of whether the Agreement should be approved.
20 Under the express terms of the Settlement Agreement, both Qwest and Staff were entitled
21 to resume their prior litigation positions if the Agreement was rejected.

22 Like its predecessor, the March 10 Recommended Order uses, in large part, the
23 terms of the original Settlement Agreement, which resolved all three dockets. Unlike the
24 Settlement Agreement, however, the March 10 Recommended Order actually resolves
25 only two of those three dockets. Accordingly, the Recommended Order now provides
26 that a hearing will be held in the 271 docket, but nevertheless orders the same relief and

1 provides for a penalty in the same amount as the December 1 Recommended Order. This
2 use of selected Settlement Agreement terms against Qwest is even more inequitable than
3 the December 1 Recommended Order, because it implements the unfavorable terms of
4 the Settlement Agreement but still leaves Qwest exposed to additional liability. In effect,
5 the March 10 Recommended Order penalizes Qwest for pointing out that Qwest has not
6 waived its right to a hearing in the 271 docket.

7 In particular, partial resolution of the consolidated docket on these terms shows
8 that the recommended penalty amount is arbitrary – the penalty has stayed the same even
9 though the alleged conduct covered by the penalty is substantially different. As Qwest
10 previously noted, the penalty set out in the December 1 Recommended Order was
11 improperly based on the assumption that the Commission has the authority to assess
12 criminal contempt sanctions, and to do so on a daily basis for the length of any violation.
13 *See, e.g.,* Qwest's Exceptions Regarding Recommended Opinion And Order Filed
14 December 1, 2003 And Request For Hearing ("Qwest's Exceptions") at 33-37 (Dec. 19,
15 2003). Even if the Commission had the authority to assess such a penalty, the March 10
16 Recommended Order makes it clear that the amount assessed is unsupported by the
17 evidence. *See, e.g.,* Qwest's Exceptions at 15-25. The penalty imposed in both versions
18 of the Recommended Order remains \$11 million, the same amount of cash payments and
19 voluntary contributions that Qwest agreed to pay under the Settlement Agreement.
20 Settlement Agreement at 3. The figures identified in the December 1 Recommended
21 Order as support for the total amount of the penalty demonstrate that approximately
22 one-third of the penalty was attributable to the 271 docket. December 1 Recommended
23 Order at 41. Nevertheless, the March 10 Recommended Order assesses the same penalty,
24 even though any reference to the allegations in the 271 docket has been deleted.

25 The penalty amount set forth in the March 10 Recommended Order is not
26 supported by substantial evidence and is based on an impermissible incorporation of the

1 amounts set forth in the Settlement Agreement into an order rejecting that Agreement.
2 Arizona law favors settlement of disputes. *See, e.g., United Bank of Arizona v. Sun*
3 *Valley Door & Supply, Inc.*, 149 Ariz. 64, 68, 716 P.2d 433, 437 (App. 1986). By
4 incorporating the cash payment and voluntary contribution amounts from the Settlement
5 Agreement into a penalty, the Commission would violate Qwest's rights that were
6 expressly recognized in the Agreement, and would discourage such settlements in the
7 future. Moreover, the Commission has no precedent or procedure for using the terms of a
8 settlement in this manner. If the Settlement Agreement is rejected, the issues in the
9 Litigation should be resolved according to the Commission's Rules of Practice and
10 Procedure as in any other contested docket, without reference to the proposed Settlement.

11 For the reasons stated above and in Qwest's prior exceptions, the Commission
12 should reject the March 10 Recommended Order and approve the Settlement Agreement
13 between Staff and Qwest. Alternatively, the Commission should refrain from entering an
14 order in this consolidated docket until all proceedings have been completed. The
15 December 1 Recommended Order was fundamentally flawed, not least in that it
16 established penalties not authorized by law, not based on substantial evidence, and not
17 allocated based on specific alleged conduct. The situation would only be made worse by
18 the March 10 Recommended Order, which is essentially attempts to justify imposing the
19 penalties outlined in the December 1 Recommended Order even though hearings in the
20 consolidated dockets have not been completed.

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2 DATED this 26th day of March 2004.

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